

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
October 24, 2006 Session

CALVIN OTIS TANKESLY v. STATE OF TENNESSEE

Direct Appeal from the Criminal Court for Davidson County
No. 96-C-1239 Seth Norman, Judge

No. M2005-02008-CCA-R3-PC - Filed June 28, 2007

The petitioner, Calvin Otis Tankesly,¹ appeals the denial of his petition for post-conviction relief. On appeal, the petitioner claims that: (1) the trial court failed to instruct the jury on all lesser-included offenses of rape of a child; (2) he was denied his constitutional right to an impartial jury as a result of juror misconduct; (3) he was improperly sentenced as a repeat violent offender; and (4) he received the ineffective assistance of counsel. Following our review of the record and the parties' briefs, we affirm the judgment of the post-conviction court denying post-conviction relief.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Criminal Court Affirmed

J.C. McLIN, J., delivered the opinion of the court, in which DAVID H. WELLES and NORMA MCGEE OGLE, JJ., joined.

Charles E. Walker, Nashville, Tennessee, for the appellant, Calvin Otis Tankesly.

Paul G. Summers, Attorney General and Reporter; C. Daniel Lins, Assistant Attorney General; Victor S. Johnson, III, District Attorney General; and Dan Hamm, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

FACTS AND PROCEDURAL HISTORY

The following is the chronological background of this case as reflected in the record before us. In December 1997, the petitioner was convicted by a Davidson County jury of one count of rape of a child and one count of attempted rape of a child. Based on his classification as a repeat violent offender, the petitioner was ordered to serve two consecutive sentences of life without parole. On direct appeal, this court affirmed the petitioner's convictions and sentences. *See State v. Calvin Otis Tanksley*, No. M1998-00683-CCA-R3-CD, 2000 WL 1521475 (Tenn. Crim. App., at Nashville, Oct.

¹ The petitioner's name is spelled the same as the name appearing on the petition for post-conviction relief.

4, 2000), *perm. app. denied* (Tenn. May 21, 2001). The following is a brief summary of the convicting evidence taken from this court's opinion on direct appeal. In the afternoon hours of May 6, 1995, the six-year-old victim was at her aunt's residence in an apartment complex in Madison, Tennessee. At the request of her aunt, the victim went to the laundry room of the apartment complex to get a soft drink. At this time, the petitioner entered the laundry room and asked the victim if she wanted any panties. The petitioner then digitally penetrated the victim and attempted to have the victim perform oral sex on him. Witnesses Kimberly and Jimmy Gilkeson passed the petitioner as they parked their car and headed to the laundry room where they discovered the victim visibly traumatized. *See id.* at *1-2.

After the petitioner was convicted and sentenced, he filed a pro se petition for writ of error coram nobis on the basis of newly discovered evidence of juror misconduct. The trial court denied relief and this court affirmed the denial on appeal. *See Calvin O. Tankesly v. State*, No. M2004-01440-CCA-R3-CO, 2005 WL 2008203 (Tenn. Crim. App., at Nashville, Aug. 19, 2005), *perm. app. denied* (Tenn. Feb. 6, 2006). Contemporaneous with the filing of his petition for writ of error coram nobis, the petitioner also filed a pro se petition for post-conviction relief. Following the appointment of post-conviction counsel and numerous amendments to the post-conviction petition, an evidentiary hearing was held.

At the hearing, the petitioner claimed he received the ineffective assistance of counsel. The petitioner testified that he asked his trial counsel to relitigate the issue of whether the photographic lineup was unduly suggestive because he was the only suspect who had a ponytail. As the petitioner explained, his previous counsel from the Public Defender's Office had filed a suppression motion on this issue, which had been heard and ruled upon. Subsequently, however, his case was transferred to another judge, and he asked counsel to petition the new judge to reconsider the issue. The petitioner asserted that counsel failed to file a second suppression motion though the petitioner conceded that counsel raised the issue orally pretrial. The petitioner also asserted that he told counsel repeatedly to raise the issue on appeal. The petitioner further claimed that counsel failed to file a motion to suppress the women's undergarments seized though the petitioner acknowledged that the record reflected some discussion of scheduling a hearing on the motion. Nonetheless, the petitioner asserted that he did not recall any hearing on a motion to suppress the undergarments seized.

The petitioner testified that he sent counsel a letter containing a list of witnesses and their contact information, but counsel failed to investigate these witnesses. In particular, the petitioner said Jerry McCrory was a material witness regarding the suppression of the photographic lineup, and he discussed with counsel the possibility of subpoenaing Mr. McCrory to testify at trial. The petitioner claimed that Mr. McCrory would testify that he saw an adult leaving the laundry room but was unable to positively identify the petitioner in the photographic lineup. The petitioner recalled that counsel told him that Mr. McCrory could not be located for trial. The petitioner also claimed that he had requested counsel obtain funds for the purpose of deposing his alibi witness, Vicki Ogden, who lived in Las Vegas, but counsel never took her deposition. The petitioner further claimed that counsel never contacted George Lake, the petitioner's former employer, or James Gully,

his father-in-law prior to trial. Had counsel contacted these witnesses before trial, counsel could have brought out the fact that the petitioner limped due to a foot injury. In addition, had counsel interviewed his wife, counsel could have brought out the fact that the women's undergarments were to be donated to Goodwill.

The petitioner testified that counsel told him to clean up so he shaved off his beard and left his mustache. However, the petitioner complained that at trial the prosecutor implied that he was attempting to alter his appearance and trick the jury. Therefore, the petitioner blamed counsel for not advising him on how to clean up for trial. The petitioner also stated that although counsel mentioned lesser-included offenses to him, counsel did not explain them. The petitioner further asserted that after the trial court denied instructions on lesser-included offenses, counsel failed to object to the court's denial and did not bring the issue up on appeal.

The petitioner claimed that he asked counsel to challenge the victim's capacity to testify at trial but counsel shrugged off his request. The petitioner stated that at trial, counsel did not object when the court initially instructed the jury that the petitioner faced fifteen to sixty years for the rape of a child when in fact this conviction required a life sentence without parole. However, the petitioner acknowledged that the court later amended the jury charge to reflect that the petitioner was facing a sentence of "fifteen years to life." Nonetheless, the petitioner argued that it was "the percentage and release eligibility that the jury must be informed of." The petitioner asserted that he had reservations regarding a juror because he thought she worked for the Tennessee Department of Correction (TDOC). However, he was not sure, therefore, he agreed with counsel to let the juror serve on the jury. Only after the trial did he learn that the juror worked for TDOC.

According to the petitioner, counsel failed to argue at sentencing that the petitioner's prior convictions for robbery with a deadly weapon should not be considered under the three-strikes law. The petitioner stated that his previous attorney from the Public Defender's Office had previously made this argument at a pretrial hearing. However, counsel did not. Instead, counsel "screamed up and down about the violation of the time for filing [-] the forty-five day rule, [and] the hundred and eighty-day rule." The petitioner further asserted that he wanted this issue included in his appellate brief but counsel refused to include it.

On cross-examination, the petitioner acknowledged that counsel did communicate with him via telephone and letters. The petitioner also acknowledged that at trial his father-in-law testified as to his injury which caused him to limp.

Steve Allen, a criminal investigator with the Public Defender's Office, testified that he interviewed Mr. McCrory on two occasions and these interviews were transcribed. During the interviews, Mr. McCrory stated that he saw an individual leave the laundry room on the day in question, but he was later unable to positively identify that person when shown a photographic lineup. However, Mr. McCrory did not specify the time he saw the individual exiting the laundry room.

Lisa Tanksley, the petitioner's wife, testified that on the day of the crime, she had a telephone conversation with the petitioner. During this conversation, the petitioner told her that he planned to meet a client after lunch to work on her computer. Mrs. Tanksley stated that counsel never asked her about this conversation. Mrs. Tanksley also said that both her young children were with the petitioner on the day of the crime. Mrs. Tanksley stated that she gave counsel a written contract resulting from the petitioner's work on the day of the crime and a Wal-Mart receipt.

George Lake, the petitioner's former employer, testified that he met with counsel once to discuss his trial testimony and the meeting place was the hallway outside the courtroom right before trial. Mr. Lake recalled that on May 6, 1995, the petitioner was off work but came into the store in the early morning with his two sons. After the petitioner left, Mr. Lake did not see the petitioner the rest of the day. Calvin Tanksley III, the petitioner's son, testified that he and his brother were with the petitioner when he stopped at the laundry room around lunchtime on May 6, 1995. He and his brother stayed in the car while the petitioner ran into the laundry room. Calvin could not recall if he was interviewed by counsel.

Counsel testified that he took the petitioner's case from the Public Defender's Office after being appointed. He recalled that he had extensive discussions with the petitioner about the case prior to trial. In particular, counsel recalled discussing potential witnesses for petitioner's defense. Counsel stated that the suppression of the photographic lineup was litigated before he took the case. Counsel did not recall the petitioner ever discussing the lineup suppression hearing and the fact that he wanted the issue raised on appeal. Counsel said that he did not raise the lineup suppression issue on appeal because he did not believe the issue had any merit. Counsel asserted that he filed a motion to suppress when the state attempted to admit into evidence three grocery sacks full of women's undergarments.

With regard to the petitioner's alibi, counsel testified that he and the petitioner spoke with Mrs. Ogden via telephone. Mrs. Ogden represented the fact that she was with the petitioner in Hendersonville around the time of the crime. However, counsel chose not to call Mrs. Ogden as an alibi witness because the trial court had ruled earlier that it would let in evidence of a similar conviction, regarded by the court as a "signature crime." Counsel noted that the petitioner had apparently pled guilty to a crime with "almost identical" facts.

With regard to other defense witnesses, counsel testified that he interviewed or read the statement of every witness that testified at trial. Counsel recalled that he interviewed Mr. Lake via telephone, and spoke with Mrs. Tanksley about her testimony on several occasions. Counsel also recalled that he attempted to contact Mr. McCrory but could not reach him. However, counsel noted that he read Mr. McCrory's interviews with the Public Defender's Office. Counsel asserted that Mr. McCrory's testimony was not relevant because Mr. McCrory had not made a positive identification of the individual seen coming from the laundry room. Counsel further asserted that he did not call Calvin Tanksley III, the petitioner's son, to testify at trial because counsel did not want to bolster the testimony of two eyewitnesses, who saw the petitioner exit the laundry room and drive off in a car containing a boy matching the description of the petitioner's son.

Counsel testified that he never told the petitioner to alter his appearance by cutting his ponytail or removing his mustache. Counsel recalled that he did tell the petitioner to shave and look good for trial. Counsel noted that the petitioner told him about having “ingrown toenails,” but counsel did not recall the petitioner walking with a limp. Counsel stated that the petitioner never told him to request lesser-included offenses, and he did not recall requesting any special instructions at trial. Counsel said he believed that asking for instructions on lesser-included offenses robbed the defense of credibility as the theory of defense was that the petitioner “wasn’t there, [and] didn’t do it.” Counsel also noted that he requested funding for investigative services but never utilized the funds because he found no need for the services.

Counsel testified that he requested an opportunity to interview the victim prior to trial but was not afforded the opportunity. However, he was provided with the *Jencks* statements of the eyewitnesses prior to trial. Counsel stated that he did not challenge the victim’s capacity to testify. He explained:

The testimony at trial was quite disturbing. . . . [The victim] could not make a verbal response in court. She had to write on a legal pad. And, I believe, Ms. Ramsey took the legal pad, and [the trial judge] did the question and answer at trial. So, once the [trial judge] made the determination she was competent to testify[,] I did not challenge that. In fact, [the victim] did not make an in-court identification of [the petitioner] and I did not even cross-examine her based on that fact.

Counsel also testified that, during voir dire, he learned that a juror worked at TDOC. According to counsel, he wanted to recuse the juror, but the petitioner wanted to keep her because he thought he and the juror had made eye contact. Later, after the Tennessee Supreme Court had denied certiorari of the direct appeal, counsel heard allegations that this juror had accessed the petitioner’s criminal record and had communicated this record to other jurors. Based on this information, counsel recommended that the petitioner file a petition for writ of error coram nobis. Counsel further testified that the issue of whether the three-strikes law applied to the petitioner was litigated by the Public Defender’s Office prior to his representation of the petitioner.

Counsel recalled that he reviewed the indictment with the petitioner. Counsel noted that the original indictment in November 1995 was replaced by a superceding indictment in July 1996. Counsel also noted that he did not receive the petitioner’s case until after the indictment and discovery phases were complete. Counsel acknowledged that he did not file anything challenging the indictment.

Counsel recalled that there was an issue concerning the jury charge which resulted in a bench conference. However, counsel could not recall if the issue related to the range of punishment or not. Counsel acknowledged the fact that the defense could not advance its alibi theory, “gutted the case.” However, counsel recalled that the victim was unable to make a positive in-court identification of the petitioner, therefore, counsel suggested to the petitioner that the defense rest its case. However,

the petitioner did not want to do this so the defense put on proof. Counsel stated that he believed his preparation and strategy of showing the inconsistencies in the eyewitnesses' testimony was the best he could do under the circumstances.

On cross-examination, counsel acknowledged that the state offered proof that the victim had previously identified the petitioner in a photographic lineup. Counsel also acknowledged that two of the eyewitnesses tentatively identified the petitioner in-court as the individual who left the laundry room.

Following the evidentiary hearing, the post-conviction court entered a detailed order denying post-conviction relief.

STANDARD OF REVIEW

In order for a petitioner to succeed on a post-conviction claim, the petitioner must prove the allegations set forth in his petition by clear and convincing evidence. Tenn. Code Ann. § 40-30-110(f). On appeal, this court is required to affirm the post-conviction court's findings unless the petitioner proves that the evidence preponderates against those findings. *State v. Burns*, 6 S.W.3d 453, 461 (Tenn. 1999). Our review of the post-conviction court's factual findings, such as findings concerning the credibility of witnesses and the weight and value given their testimony, is de novo with a presumption that the findings are correct. *See id.* Our review of the post-conviction court's legal conclusions and application of law to facts is de novo without a presumption of correctness. *Fields v. State*, 40 S.W.3d 450, 457-58 (Tenn. 2001).

ANALYSIS

I. Lesser-Included Offenses

On appeal, the petitioner first argues that the trial court erred by failing to instruct the jury on aggravated sexual battery and attempted aggravated sexual battery as lesser-included offenses of child rape. The state argues that the petitioner has waived this issue under Tennessee Code Annotated section 40-30-106(g). We agree.

We begin by noting that at the time of the defendant's trial, the trial court had a duty to instruct on all lesser-included offenses supported by the evidence, whether or not requested by the defendant. *See* Tenn. Code Ann. § 40-18-110 (1979); *see also State v. Page*, 184 S.W.3d 223, 229 (Tenn. 2006) (comparing the prior version of section 40-18-110 with the current version effective in 2002). However, in this case, the petitioner has waived this issue for failing to raise it on direct appeal as required by the Post Conviction Procedure Act. A ground for relief is waived "if the petitioner personally or through an attorney failed to present it for determination in any proceeding before a court of competent jurisdiction in which the ground could have been presented." Tenn. Code Ann. § 40-30-106(g); *see also Wiley v. State*, 183 S.W.3d 317, 327-28 (Tenn. 2006). Additionally, the petitioner is not entitled to a plain error review of this issue because the plain error doctrine does not apply in post-conviction relief proceedings. *See Marcus E. Thompson v. State*, No.

E2004-03028-CCA-R3-PC, 2006 WL 36907, at *12 (Tenn. Crim. App., at Knoxville, Jan. 4, 2006); *Corwyn E. Winfield v. State*, No. W2003-00889-CCA-R3-PC, 2003 WL 22922272, at *5 (Tenn. Crim. App., at Jackson, Dec. 10, 2003), *perm. app. denied* (Tenn. May 10, 2004); *see also State v. West*, 19 S.W.3d 753, 756-57 (Tenn. 2000). Accordingly, the issue is waived.

II. Juror Misconduct

The petitioner next argues that his constitutional right to a fair trial was violated because of juror misconduct. Specifically, the petitioner alleges that Juror Jones, employed at the Davidson County Sheriff's Office, had knowledge of the petitioner's criminal record and imparted this extraneous prejudicial information to the other members of the jury at his trial. To support this allegation, the petitioner incorporated into the record the documents and transcripts related to his previously filed petition for writ of error coram nobis.

Upon review, we note that this issue was raised in the petitioner's petition for writ of error coram nobis; whereupon, the petition was ultimately denied by the lower court after an evidentiary hearing. *See Tankesly*, 2005 WL 2008203 at *1-5. Thereafter, this court thoroughly reviewed the issue and found that the petitioner had waived the issue for not presenting it in a petition for post-conviction relief. *Id.* at 6. Nonetheless, after finding the issue waived, this court went on to discuss the merits of the issue as follows:

We also agree with the State that, even if not waived, the evidence presented at the evidentiary hearing did not support the petitioner's allegations of juror misconduct. Although the petitioner presented evidence that Ms. Jones may have later bragged to others that she had accessed and shared the petitioner's criminal record with her fellow jurors, none of the jurors who testified corroborated that claim. As the trial court observed, seven of the nine jurors who testified stated that they were not exposed to any information about the petitioner's criminal record or incarceration prior to rendering their verdicts. Mr. Gillespie, the only juror who testified he heard Ms. Jones make any extraneous comment about the petitioner, stated that she said only that she knew the petitioner was in prison, that the comment was made in passing at the end of the table after deliberations were completed, and that the jury did not resume deliberations or change its verdict in any fashion as a result of the information. Ms. Jones denied that she ever pulled the petitioner's criminal record and stated that she could not have done so because she had no access to the computer system where the records were stored. She further testified that she did not remember having said anything to her fellow jurors about her belief, based on her recognition of the transportation officers, that the petitioner was in jail and that she knew it would cause complications with the jury if she spoke of it. Thus, the key testimony of the jurors failed to show that the jurors were exposed to any extraneous information about the petitioner's prior record or current incarceration during their deliberations.

Id. at *7. Given our previous determination of this issue, we conclude that the petitioner failed to prove by clear and convincing evidence that his constitutional right to a fair trial was violated. Therefore, the petitioner is not entitled to relief on this issue.

III. Sentencing

The petitioner next argues that the trial court erred in utilizing his prior convictions of robbery with a deadly weapon to sentence him as a repeat violent offender. However, this issue was raised on direct appeal and adjudicated by this court. *See Tanksley*, 2000 WL 1521475 at *9 (finding that the defendant was properly sentenced as a repeat violent offender). Issues which have been previously determined may not be raised through a post-conviction challenge. *See* Tenn. Code Ann. § 40-30-106(g); *see also Miller v. State*, 54 S.W.3d 743, 747-48 (Tenn. 2001). An issue is “previously determined if a court of competent jurisdiction has ruled on the [issue’s] merits after a full and fair hearing.” *Id.* § 40-30-106(h). Accordingly, this issue is not subject to further review by this court and is without merit.

IV. Ineffective Assistance of Counsel

The petitioner next argues that he received the ineffective assistance of counsel, alleging the following:

1. Counsel was ineffective in failing to utilize Jerry McCrory at the petitioner’s suppression hearing.
2. Counsel was ineffective in failing to utilize Jerry McCrory at trial.
3. Counsel was ineffective in failing to interview Mr. Lake prior to trial.
4. Counsel was ineffective in failing to investigate and pursue the petitioner’s alibi defense.
5. Counsel was ineffective in failing to file a suppression motion concerning the introduction of the women’s undergarments found at the petitioner’s residence.
6. Counsel was ineffective in advising the petitioner to alter his appearance prior to trial.
7. Counsel was ineffective in failing to challenge the constitutionality of the photographic lineup on appeal.
8. Counsel was ineffective in failing to request jury instructions on the lesser-included offenses of aggravated sexual battery and attempted aggravated sexual battery.
9. Counsel was ineffective in failing to assert at trial a “distinctive defense theory.”
10. Counsel was ineffective in failing to utilize investigative services to assist the petitioner’s case.
11. Counsel was ineffective in failing to challenge the victim’s capacity to testify at trial.
12. Counsel was ineffective in failing to object to the written jury charge containing an incorrect release eligibility date.

13. Counsel was ineffective in failing to ascertain that Juror Jones had knowledge of or access to the petitioner's criminal record.

14. Counsel was ineffective in failing to properly argue that the petitioner's sentence as a repeat violent offender was incorrect under Tennessee Code Annotated section 40-35-120.

In order to establish the ineffective assistance of counsel, the petitioner bears the burden of proving that (1) counsel's performance was deficient and (2) the deficient performance prejudiced the defense rendering the outcome unreliable or fundamentally unfair. *See Strickland v. Washington*, 466 U.S. 668, 687 (1984); *see also Arnold v. State*, 143 S.W.3d 784, 787 (Tenn. 2004). Deficient performance is shown if counsel's conduct fell below an objective standard of reasonableness under prevailing professional standards. *Strickland*, 466 U.S. at 688; *see also Baxter v. Rose*, 523 S.W.2d 930, 936 (Tenn. 1975) (establishing that representation should be within the range of competence demanded of attorneys in criminal cases). A fair assessment of counsel's performance, "requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Strickland*, 466 U.S. at 689; *see also Nichols v. State*, 90 S.W.3d 576, 587 (Tenn. 2002). The fact that a particular strategy or tactical decision failed does not by itself establish ineffective assistance of counsel. *Goad v. State*, 938 S.W.2d 363, 369 (Tenn. 1996). Prejudice is shown if, but for counsel's unprofessional errors, there is a reasonable probability that the outcome of the proceeding would have been different. *Strickland*, 466 U.S. at 694. Both deficient performance and prejudice must be established to prove ineffective assistance of counsel. *Id.* at 697. If either element of ineffective assistance of counsel has not been established, a court need not address the other element. *Id.*

1. Failure to Utilize McCrory at the Suppression Hearing

The petitioner first claims that counsel failed to utilize Jerry McCrory to attack the photographic lineup at the suppression hearing. However, a review of the petitioner's argument in his brief clearly indicates that the petitioner is attempting to relitigate the admission of the photographic lineup, an issue already determined on direct appeal. *See Tanksley*, 2000 WL 1521475 at *8 ("[W]e do not find that the photographic array was tainted or unconstitutionally suggestive."). Again, issues which have been previously determined may not be revisited through a post-conviction challenge. *See Tenn. Code Ann. § 40-30-106(g)*. Also, as an aside, we fail to see how Mr. McCrory's testimony – that he could not positively identify anyone out of the photographic lineup – would have aided the petitioner in proving the photographic lineup was impermissibly suggestive. Moreover, the record clearly reflects that counsel was not appointed to represent the petitioner until after the lineup suppression hearing. Accordingly, this claim is entirely without merit.

2. Failure to Utilize McCrory at Trial

The petitioner's claim that counsel was ineffective for "failing to interview, develop or subpoena Jerry McCrory" to testify at trial" also fails. Apparently, in making this claim, the

petitioner relies on Mr. Allen's testimony that Mr. McCrory said he was unable to positively identify the person he saw at the laundry room. However, regarding any deficiency in counsel's representation, the record reflects that Mr. Allen, a criminal investigator for the defense, interviewed Mr. McCrory on two occasions and these interviews were submitted to counsel. The record also reflects that counsel attempted to contact Mr. McCrory at the petitioner's request but was unable to do so. Thus, we fail to see how counsel was deficient in this regard. Additionally, with regard to prejudice, no evidence was presented that Mr. McCrory was at the laundry room the same time the crimes took place, and petitioner did not present Mr. McCrory to testify otherwise. As a general rule, "[w]hen a petitioner contends that trial counsel failed to discover, interview, or present witnesses in support of his defense, these witnesses should be presented by the petitioner at the evidentiary hearing." *Black v. State*, 794 S.W.2d 752, 757 (Tenn. Crim. App. 1990). Neither the post-conviction court nor this court may speculate on what a witness' testimony might have been if introduced by counsel. *Id.* Furthermore, Mr. McCrory's inability to positively identify anyone out of the photographic lineup bears little to no significance to the petitioner's defense in light of the fact that two eyewitnesses observed the petitioner exit the laundry room immediately following the sexual assault of the victim whereupon they both identified the petitioner in the photographic lineup and at trial. As aptly stated by the post-conviction court, "it is difficult to see how Mr. McCrory could have aided the defense with any significant testimony" Accordingly, the petitioner did not prove the ineffective assistance of counsel, and the issue is without merit.

3. Failure to Interview Mr. Lake Prior to Trial

The petitioner next claims that counsel was ineffective for failing to interview his former employer, Mr. Lake, prior to trial. However, contrary to the petitioner's claim, the record reflects that counsel interviewed Mr. Lake via telephone prior to trial and interviewed him again on the day of trial. Furthermore, petitioner failed to demonstrate prejudice. At the post-conviction hearing, Mr. Lake vaguely recalled that the petitioner came into the store with his two sons on May 6, 1995, during the early morning hours but left and was not seen the rest of the day. As the post-conviction court stated, "[i]t is unclear as to how [counsel] could have gained further insight on the case by questioning Mr. Lake any more than he already had." The record does not preponderate against the post-conviction court's findings, and the issue is without merit.

4. Failure to Pursue Alibi Defense

The petitioner next complains that counsel was ineffective in abandoning his alibi defense at trial. At the post-conviction hearing, the petitioner alleged he was with Vickie Ogden on May 6, 1995, during the time the six-year-old victim was sexually assaulted. However, the record reflects that counsel sought to employ the petitioner's alibi defense at trial but made a strategic decision to abandon it after the trial judge ruled against the defense in a 404(b) evidentiary hearing. At the hearing, the trial judge ruled that the use of an alibi would place petitioner's identity at issue; therefore, the petitioner's prior bad acts of sexual assault of children would be admissible as "signature crimes" to prove the petitioner's identity. On direct appeal, this court found the judge's ruling correct. As the post-conviction court aptly put:

Unfortunately, the petitioner already had a history of committing acts so similar to this one Each of the three episodes, including this one, occurred within a three week period in an apartment complex with female victims between the ages of three and six years old, with the petitioner promising the victims something just before committing the acts. Had [counsel] presented Ms. Ogden's alibi testimony, [the petitioner's prior] acts would have become known to the jury, probably proving to be overwhelmingly detrimental to the defense. It is not the Court's function to "'second guess' tactical and strategic choices pertaining to defense matters or to measure a defense attorney's representation by '20-20 hindsight.'" *Henley v. State*, 960 S.W.2d 572, 579 (Tenn. 1997) (quoting *Hellard v. State*, 629 S.W.2d 4, 9 (Tenn. 1982)). [Counsel's] decision to not present the alibi defense was indeed prudent, [nonetheless], the existing evidence against the petitioner was almost certainly insurmountable.

Likewise, we will not second-guess the legitimate strategic decision of counsel. Again, the record does not preponderate against the post-conviction court's findings, and the issue is without merit.

5. Failure to File a Motion to Suppress

The petitioner next claims that counsel was ineffective in failing to file a motion to suppress 400 pairs of women's undergarments found at the petitioner's residence and seized by police. Contrary to the petitioner's claim, however, the record indicates that counsel did in fact file a motion to suppress. As the post-conviction court found:

[F]rom the transcripts of the proceedings, it appears as though trial counsel did in fact argue to have the undergarments suppressed at a hearing on December 4, 1997. [Counsel] actually filed a motion to suppress this particular evidence based on the grounds that the search warrant was defective, but . . . it was denied.

In addition, on direct appeal, this court found the introduction of the women's undergarments to be harmless error. *See Tanksley*, 2000 WL 1521475 at *7. Accordingly, it is abundantly clear that the petitioner has failed to prove either deficient performance or prejudice resulting from counsel's representation of this issue. The issue is without merit.

6. Failure to Advise Against Altering Appearance

The petitioner next claims that counsel was ineffective in advising him to "clean up" prior to trial but not advising him about the consequences of altering his appearance. However, in making this worthless claim, the petitioner ignores his own admissions that he chose to alter his own appearance for his own reasons. As the post-conviction court found:

[Counsel] testified that he did not advise the petitioner to alter his appearance for the trial. He said that he usually tells his clients that it is a good idea to shave and look respectable. When the offense was committed, the petitioner had a ponytail and

was clean-shaven but at trial [the petitioner] had shorter hair and a moustache. When questioned about the [alteration], the petitioner remarked that he normally grows a beard in the winter and cuts his ponytail in the summer. He further commented that his wife did not like him having a beard, so he shaved it off but left the moustache. The Court fails to see how this proves that counsel was ineffective

Likewise, based on the record, this court is unable to determine any deficient performance by counsel or resulting prejudice. The petitioner has therefore failed to prove ineffective assistance and the issue is without merit.

7. Failure to Challenge the Constitutionality of the Photographic Lineup on Appeal

The petitioner next claims that “counsel did not preserve the challenged photo array for appeal purposes.” However, the petitioner’s claim ignores the fact that the constitutionality of the photographic lineup was reviewed on the merits on appeal and found to be constitutionally permissible. *See Tanksley*, 2000 WL 1521475 at *8 (reviewing the issue of whether the photographic array was unconstitutionally suggestive). Obviously, the fact that the issue was determined on direct appeal directly contradicts the petitioner’s claim. Moreover, we conclude the petitioner failed to offer proof in support of this claim at the post-conviction hearing. Accordingly, the issue is without merit.

8. Failure to Request Jury Instructions

The petitioner next complains that counsel was deficient in failing to request jury instructions on the lesser-included offenses of aggravated sexual battery and attempted aggravated sexual battery. At the evidentiary hearing, counsel recalled that he did not request lesser-included offenses because the request undermined the petitioner’s theory of defense that “[he] wasn’t there, [he] didn’t do it.” Interestingly, the petitioner testified that counsel requested instruction on lesser-included offenses but did not object when the court did not charge them.

Upon review, we note that the petitioner’s claim must be evaluated under the prevailing standards applicable at the time of his trial. As the post-conviction court found:

At the time of the trial . . . courts were to avoid the practice of charging lesser-included offenses where there was no evidence to support them. *State v. Mellons*, 557 S.W.2d 497, 499 (Tenn. 1977).

The testimony of the victim [at trial] clearly conveyed the fact that she had been digitally penetrated. The petitioner did not testify at trial nor did he offer any evidence to contradict the evidence presented by the prosecution. In fact, the petitioner’s defense was based on the assertion that he was not the perpetrator of these offenses. “When there is no evidence to support a lesser included offense so that the accused can only be guilty of the greater offense or no offense at all, it is not error to refuse to instruct on the lesser included offenses.” *Moorman v. State*, 577 S.W.2d

473, 475 (Tenn. Crim. App. 1978); *see State v. Tutton*, 875 S.W.2d 295, 297 (Tenn., 1993).

Again, the record does not preponderate against the findings of the post-conviction court. To reiterate, the petitioner must prove his claims of ineffective assistance of counsel by clear and convincing evidence. The petitioner has not done so, and we conclude the issue is without merit.

9. Failure to Assert the “Distinctive Defense Theory”

The petitioner next claims that counsel failed to investigate and assert a distinctive defense theory that the petitioner walked with a pronounced limp at the time of the offense. However, the petitioner fails to support his claim with any legal citation to authority and the issue is waived. *See* Tenn. Ct. Crim. App. R. 10(b); Tenn. R. App. P. 27(a)(7). Furthermore, the record does not support this claim. At the post-conviction hearing, the petitioner admitted that his father-in-law testified at trial about the petitioner’s foot injury. Additionally, the trial transcript reveals that the jury heard this so-called “distinctive defense theory” via the testimony of other defense witnesses. The record reflects that defense witnesses George Lake and James Gully both testified at trial that the petitioner had a foot injury and wore sandals. Accordingly, we conclude that the petitioner failed to prove deficient conduct or prejudice. The issue is without merit.

10. Failure to Utilize Investigative Services

The petitioner next claims that counsel was ineffective in failing to utilize the services of a private investigator. Specifically, the petitioner asserts that counsel’s decision not to use investigative funds to interview possible witnesses at trial constitutes the ineffective assistance of counsel.

At the post-conviction hearing, the petitioner testified that he asked counsel to obtain funds to interview Ms. Ogden prior to trial. Counsel testified that he interviewed Ms. Ogden prior to trial. In addition, counsel stated that he either interviewed or read the statement of every witness who testified at trial. Counsel said that he requested funding for investigative services but never utilized the funds because he believed the services were not necessary. Counsel further stated that the petitioner never requested he employ investigative services.

In addressing this issue, the post-conviction court found:

[I]t appears as though a motion to secure such funds was actually filed on September 24, 1997 but was never argued.

[Counsel] testified at the evidentiary hearing that he chose not to pursue this motion because he felt as though it would not have assisted in preparing a defense in this case. . . . In [counsel’s] opinion, it would have served no purpose to secure investigative funds and he is probably right. The petitioner offered no proof as to how investigators could have aided in amassing more evidence which would

exculpate him. He has thus failed to show how he was prejudiced by counsel's decision not to seek investigative funds.

Again, the record does not preponderate against the findings of the post-conviction court. As noted by the post-conviction court, the petitioner has failed to show any prejudice, and the issue is without merit.

11. Failure to Challenge the Victim's Capacity to Testify at Trial

The petitioner next complains that counsel was ineffective for not challenging the capacity of the eight-year-old victim to testify at trial. The petitioner cites *Ball v. State*, 219 S.W.2d 166 (Tenn. 1949) for the proposition that children under age fourteen are presumed to be incompetent to testify. However, we note that Tennessee Rule of Evidence 601 expressly states that "[e]very person is presumed competent to be a witness except as otherwise provided in these rules or by statute." As the advisory comments to Rule 601 explain, the proposition announced in *Ball* is contra to Rule 601 and no longer applies. *Id.* Moreover, there exists no evidence that the victim was incompetent to testify. As the post-conviction court found:

At the trial in this matter, both this Court and the State questioned the victim as to whether she understood . . . how important it was to testify truthfully under oath. She said she understood that if she did not tell the truth that she would get in trouble. . . . The victim, who was one month short of being nine years old at the time of the trial, was obviously competent to testify accurately and honestly. To call into question the victim's capacity to testify would have proven unsuccessful and [counsel] cannot be faulted for not doing so.

The record does not preponderate against the findings of the post-conviction court. Likewise, we find no reason to second-guess the legitimate strategic decision of counsel. The issue is without merit.

12. Failure to Challenge an Incorrect Release Eligibility Date in the Jury Charge

The petitioner next claims that counsel was ineffective for failing to object to an incorrect release eligibility date in the written jury charge. The petitioner relies on *State v. Meyer*, 994 S.W.2d 129 (Tenn. 1999). In *Meyer*, the defendant was convicted of two counts of rape of a child. *Id.* at 131. At trial, the trial court instructed the jury that he would be eligible for release following a conviction of child rape after serving 5.73 years of his sentence, when in reality, a conviction of child rape mandates 100% service of sentence with no release eligibility. *See id.* Therefore, our supreme court found that the trial court's instruction to the jury, which contained an inaccurate release eligibility date for the charged offense, was reversible error. *Id.* at 132. Our supreme court then held that the defendant was prejudiced by the erroneous jury instruction because it was reasonably probable that the defendant would have been convicted of a lesser offense had the jury known that he would not be eligible for early release. *Id.*

In its order, the post-conviction court found that this issue was waived because the petitioner failed to present sufficient proof of prejudice at the post-conviction hearing. We agree. The record reflects that the trial court initially instructed the jury that the term of imprisonment for the rape of a child was not less than fifteen years nor more than sixty years. The court then charged the jury that the offense of rape of a child offered no release eligibility, stating that “the minimum number of years a person sentenced to imprisonment for this offense . . . before reaching the earliest release eligibility date is fifteen years. This calculation is based on the minimum sentence possible which is fifteen years.” Then, prior to deliberation, the court was advised that the defendant qualified as a repeat violent offender, therefore, the range punishment was fifteen to life imprisonment. The court then corrected its prior instruction by telling the jury that:

As to Count One of the indictment, ladies and gentlemen, I have previously charged you that the range of punishment was fifteen to sixty years. The range of punishment is, in fact, fifteen years to life imprisonment.

All right, with that correction you may now retire to consider . . . your verdict.

The court also amended the written charge to show the corrected range of punishment and to reflect “the earliest release eligibility date is life.”

Effective prior to the petitioner’s trial, Tennessee Code Annotated section 40-35-501(g) and (I) stated in pertinent part:

(g) There shall be no release eligibility for a defendant receiving a sentence of imprisonment for life without parole as a repeat violent offender.

. . . .

(i)(1) There shall be no release eligibility for a person committing an offense, on or after July 1, 1995, that is enumerated in subdivision (i)(2). . . .

(2) The offenses to which the provisions of subdivision (i)(1) apply are:

. . . .

(I) Rape of a child[.]

It is our view the petitioner’s case is distinguishable from *Meyers* in that the applicable range of punishment and release eligibility was ultimately made known to and contemplated by the convicting jury prior to deliberation. Compare *Meyers*, 994 S.W.2d at 131-32. As such, we conclude the petitioner has failed to prove prejudice by clear and convincing evidence. See *State v. Cook*, 816 S.W.2d 322, 326 (Tenn. 1991) (finding that prejudice occurs when a defendant receives a sentence greater than range of punishment contemplated by the jury). The petitioner is not entitled to relief on this issue.

13. Failure to Challenge Juror Jones

The petitioner next claims that counsel was ineffective in failing to ascertain that Juror Jones had knowledge of or access to the petitioner's criminal record. The post-conviction court found:

The petitioner previously addressed this issue in his Petition for Writ of Error Coram Nobis which was heard and ruled upon by this Court. When questioned about the matter of juror Jones at the evidentiary hearing . . . [Counsel] testified that he told the petitioner that he did not want Ms. Jones on the jury but that the petitioner told him that he had some sort of eye contact with her and wanted her to remain. The petitioner testified . . . that he told [counsel] that he did not want her on the jury but that [c]ounsel commented on who was left in the pool from which to choose. The petitioner went on to say that ultimately they both agreed to keep Ms. Jones on the jury because she seemed as though she would be a better juror than some of the other possible jurors who remained in the pool.

Ms. Jones testified at the hearing on the Petition for Writ of Error Coram Nobis that she did not access the petitioner's records while she served on the jury. However, she presumed he was incarcerated due to the fact that she recognized the transportation guards who were present with the petitioner at all times in the courtroom during the trial.

The credibility and weight of witnesses' testimony is to be resolved by the post-conviction court. . . . The petitioner is a convicted felon with an extensive criminal record, which detrimentally affects his credibility as a witness. On the other hand, [counsel] is a well-respected defense attorney, which tends to add weight to his credibility. Assuming that the petitioner's testimony is closer to the truth, it still falls short of proving that counsel's representation was insufficient in failing to challenge Ms. Jones and prevent her from serving on the jury. Nowhere in her testimony does Ms. Jones ever assert that her suspicion of the petitioner's incarceration during the trial affected her deliberation and agreement with the other jurors that the petitioner was guilty of the offenses. Moreover, the petitioner stated that he and [counsel] ultimately agreed that they should keep Ms. Jones on the jury. . . .

Again, we conclude that the record does not preponderate against the findings of the post-conviction court. Moreover, we note that on appeal from the petitioner's petition for writ of error coram nobis, we determined that "the key testimony of the jurors failed to show that the jurors were exposed to any extraneous information about the petitioner's prior record or current incarceration during their deliberations." *Tankesly*, 2005 WL 2008203 at *7. Therefore, the petitioner failed to prove he was prejudiced by any alleged deficiency of counsel. The issue is without merit.

14. Failure to Challenge the Petitioner's Status as a Repeat Violent Offender

The petitioner next claims that counsel was ineffective in failing to properly argue that the petitioner's sentence as a repeat violent offender was incorrect under Tennessee Code Annotated

section 40-35-120. However, as previously determined on direct appeal, the petitioner was properly sentenced as a repeat violent offender. *See Tanksley*, 2000 WL 1521475 at *9. Pursuant to section 40-35-120(a), a defendant qualifies as a repeat violent offender if the defendant meets one of three separate criteria. To qualify, a defendant can meet the criteria found in either (a)(1) and (2); or (a)(3) and (4); or (a)(5) and (6). Only if the defendant qualifies under the criteria found in (a)(5) and (6) does the exception for robbery by use of a deadly weapon apply. On appeal, this court found that the petitioner qualified as a repeat violent offender under 40-35-120(a)(1) and (2) which provides no exception for robbery by use of a deadly weapon. Again, the petitioner fails to demonstrate either deficient performance or prejudice under *Strickland*. The issue is without merit.

CONCLUSION

Upon our review of the record and the parties' briefs, we conclude that the petitioner's claims are devoid of legal merit. There is nothing in the record that preponderates against the trial court's findings that the petitioner received the effective assistance of counsel. Furthermore, our review revealed no violation of the petitioner's constitutional rights. Therefore, we affirm the post-conviction court's denial of post-conviction relief.

J.C. McLIN, JUDGE